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A P P E A R A N C E S (CONT'D.)

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11:17 a.m.

P R O C E E D I N G S

**THE CLERK:** Calling civil case 18-6753-PJH, Zakinov, et al. versus Ripple Labs, Inc., et al.

Counsel, please step forward and state your appearances.

**MR. ELKHUNOVICH:** Good morning, Your Honor. Oleg Elkhunovich of Susman Godfrey for the plaintiffs.

**THE COURT:** All right. Good morning.

**MR. TAYLOR-COPELAND:** Good morning, Your Honor. James Taylor-Copeland also on behalf of plaintiffs.

**THE COURT:** All right. Good morning.

**MR. MARSHALL:** Good morning, Your Honor. Damien Marshall from Boies Schiller Flexner for the defendants.

**THE COURT:** Good morning.

**MR. GOEDMAN:** Menno Goedman also from Boies Schiller on behalf of defendants.

**THE COURT:** Good morning.

**MS. HARTNETT:** And Kathleen Harnett, Boies Schiller for defendants.

**THE COURT:** All right. Good morning.

Who's going to argue the motion? This matter's on for hearing on motion to dismiss.

**MR. MARSHALL:** I will argue for defendants, Your Honor.

**THE COURT:** Okay.

1           **MR. ELKHUNOVICH:** I will argue for the plaintiffs,  
2           Your Honor.

3           **THE COURT:** All right.

4           All right. Can we -- let's talk about this statute of  
5           repose first as it -- has been raised with respect to the  
6           federal claims. And, you know, that's a big chunk, although  
7           there are, what, seven causes of action, two federal and --  
8           yeah, five -- five state claims.

9           **MR. MARSHALL:** Yes.

10          **THE COURT:** All right.

11          So let's talk about the federal claims first then. And  
12          the big argument raised by the defense, as I understand the  
13          papers, you're conceding for purposes of this motion that the  
14          XRP is a security.

15          **MR. MARSHALL:** For the purposes of this motion on  
16          this procedural posture.

17          **THE COURT:** Right.

18          **MR. MARSHALL:** Yeah.

19          **THE COURT:** All right. So the only question is  
20          whether or not the federal claims are viable.

21          You've made the argument with regard to the statute of  
22          repose. I note that no one cited and we're unaware of any  
23          Ninth Circuit authority on this issue.

24          There are some district court cases, and there's the  
25          Second Circuit decision in *Stolz*.

1           **MR. MARSHALL:** Correct.

2           **THE COURT:** That's the main authority that's been  
3 offered on this issue.

4           **MR. MARSHALL:** Correct, Your Honor.

5           **THE COURT:** Okay.

6           **MR. MARSHALL:** So, Your Honor, the -- in this  
7 complaint, the plaintiff makes several allegations that we  
8 feel compel a finding or conclusion that the claims are barred  
9 by the statute of repose. The first of those is that all of  
10 the XRP was created at the same time in 2013. The next is  
11 that from 2013 to 2015, XRP was offered to the public for  
12 sale. These sales, according to paragraph 157, were random  
13 and indiscriminate. They weren't targeted in any way.

14           In paragraphs 128, there is an allegation that all XRP is  
15 fungible. These allegations, we believe, demonstrate that the  
16 application of the statute of repose to these claims, which  
17 were brought in 2018, more than three years after the security  
18 was initially offered to the public, mandates application of  
19 the statute of repose.

20           And as you see in our briefs, we've relied primarily on  
21 the analysis of the *Stolz* court. We believe that *Stolz*  
22 performed an extremely thoughtful analysis serving the  
23 relevant case law, including the *Bestline* series of cases that  
24 are relied upon by the plaintiffs, the commentators, and also  
25 the -- solicited the views of the SEC.

1 And it addressed sort of all of the arguments that  
2 plaintiffs raise regarding what is a bona fide offer. It  
3 addressed the consequence of applying the first offered rule,  
4 although that holding of *Stolz* is limited to the facts of the  
5 case, as all cases are limited to their facts.

6 It went on to recognize that the application of the first  
7 offered rule would lead to a circumstance where a claim was  
8 distinguished before the security itself was purchased.

9 And in finding that that consequence is acceptable, that  
10 that sequence is what Congress intended, it relied upon the  
11 case law. And it also relied upon the amendments of the  
12 statute of repose from a ten-year statute of repose to a  
13 three-year statute of repose.

14 And a -- when that change was made, an amendment was  
15 offered that would have precluded the situation where a  
16 security offered or sold after the statute of repose had run  
17 would be immunized, as is the case now. That amendment was  
18 rejected.

19 And the court -- the court inferred from that the  
20 statutory intent to have the result that occurs now.

21 There is always going to be tension between the remedial  
22 function of a statute in repose. That's -- that's the nature  
23 of repose. It is a limitation on continuing liability,  
24 continuing remedies. It is up to Congress to draw that line.

25 As Judge Calabresi noted in his concurrence, the outcome

1 mandated by the finding that the first offered rule applies is  
2 that there will be circumstances where a security is purchased  
3 outside of the repose period and there is no claim. But that  
4 is the congressional intent.

5 I think that the *Stolz* case also addresses in the context,  
6 they call it a slow offer. This -- the situation of the same  
7 security being offered throughout a period of time. If you  
8 look in our reply brief at footnote 5, we cite a series of  
9 cases where the security was offered -- first offered well --  
10 you know, three to five to seven years before the actual  
11 purchase. And the courts in those cases applied the first  
12 offered rule, just like here, and precluded a claim under the  
13 statute of repose where the statute of repose had run even  
14 before the security was purchased.

15 So I think the *ANZ* case, which plaintiff relies upon for a  
16 snippet of language regarding the last culpable act. I think  
17 the *ANZ* case supports our position. And it's supports our  
18 position because it expressly finds and holds that equitable  
19 concerns should not inform an analysis of a statute of repose.

20 And so in that context, *ANZ* helps us. The language that  
21 is relied upon, we believe, is -- you know, it is dicta. It  
22 was a quote from the *Waldburger* case that was considering a  
23 North Carolina statute of repose that had that last culpable  
24 act language in it.

25 So we don't think that the Supreme Court's language sort

1 of up ends the *Stolz* line of cases, all of the cases that have  
2 relied upon it, you know, especially when the issue wasn't  
3 presented. It wasn't briefed. They didn't solicit the views  
4 of the SEC.

5 So I think all that plaintiff is left with because the --  
6 the claims of multiple offers of the same security, *Stolz*  
7 expressly says there will be later offerings, plural -- later  
8 offerings that are not going to have a remedy.

9 So I think that what plaintiff is left with is an argument  
10 that the XRP that was offered in 2017, '18, '19 is different,  
11 than the different security than this XRP that was offered in  
12 2013, '14, and '15.

13 That runs sort of the headlong into their allegations  
14 regarding all XRP was created in 2013. It runs headlong into  
15 the allegations that all XRP is fungible. And it runs  
16 headline (sic) into their class definition of all purchasers  
17 of XRP.

18 Their class definition doesn't say all purchasers of this  
19 offering. It doesn't say all purchasers of a certain date.  
20 There's no temporal limitation. The complaint itself  
21 recognizes all XRP is the same from the first -- when it was  
22 first offered till when it is being offered today.

23 **THE COURT:** And the XRP II?

24 **MR. MARSHALL:** XRP is a company.

25 **THE COURT:** But it was selling the same XRP --



1           **MR. MARSHALL:** Yes.

2           **THE COURT:** -- the same virtual currency?

3           **MR. MARSHALL:** Right. And that switch happened well  
4 before -- in 2013, as alleged in the complaint and  
5 incorporated by reference in the settlement agreement with the  
6 government. That switch between Ripple selling and XRP  
7 selling happened in 2013. So even if that did have any sort  
8 of impact, that's -- repose would have run by the time this  
9 complaint was filed.

10          **THE COURT:** Um-hmm. Okay.

11          All right. Do you want to respond, this issue before we  
12 move to California claims?

13          **MR. ELKHUNOVICH:** Yes. Thank you, Your Honor.

14          Like many of defendants other arguments, the repose  
15 argument raises disputed factual issues that simply cannot be  
16 decided at this motion to dismiss stage.

17          Let me start with the *Stolz* case. Of course, as the court  
18 has recognized, the Ninth Circuit hasn't spoken on the issue.  
19 The only in district decision, the *Hudson* case adopted the  
20 lost (sic) offered rule following the reasoning of the  
21 *Bestline* products.

22          But even if the court was to find the reasoning of the  
23 Second Circuit in *Stolz* persuasive, to the extent that it  
24 adopted the first offered rule, that decision is explicitly  
25 limited on page 102 of the opinion where it states, "we need

1 to briefly cabin our discussion structure to the facts of the  
2 present case as elucidated in *Stolz's* pleadings. We're  
3 dealing with a single public offering of unregistered  
4 securities that began more than three years before *Stolz* filed  
5 its complaint but was concluded within the three years' repose  
6 period. It is not, therefore, the situation of a defendant's  
7 being granted immunity to continue illicit offers without  
8 civil liability after three years have passed."

9 So *Stolz* is a very different factual circumstance because  
10 in *Stolz*, there was no dispute that there was a single  
11 offering to the public pursuant to a prospectus. Here, we  
12 have exactly the opposite situation.

13 First of all, defendants continue to sell XRP in multiple  
14 offerings to this date. And starting in 2017, defendants  
15 completely changed the way they sold XRP by putting 55 billion  
16 of it into escrow and cryptographically releasing 1 billion at  
17 a time on the monthly basis and only having that amount being  
18 available for sale by the defendants.

19 **THE COURT:** I don't understand how that has an impact  
20 whatsoever. The way in which they sold it isn't -- doesn't do  
21 anything to affect the fact that it was all created at the  
22 same time. It's all the same -- the same product.

23 **MR. ELKHUNOVICH:** So two things, or maybe three  
24 actually. XRP was all created at the same time, whatever that  
25 means --

1           **THE COURT:** Well, you pled that.

2           **MR. ELKHUNOVICH:** -- 2013.

3           Yes, we did. And we're not walking away from that  
4           contention. It was all created in 2013. But when a security  
5           was, quote, unquote, created is not an inquiry on under the  
6           statute of repose. The inquiry is when the security was  
7           offered -- bona fide offered to the public. And *Stolz* case  
8           discusses this in great detail.

9           Now, we haven't seen from either the -- we certainly  
10          haven't alleged and we haven't seen from the briefing and the  
11          counsel didn't tell us today when did -- when do they contend  
12          the defendant's bona fide -- made a bona fide offer of XRP to  
13          the public. We didn't know the answer to that. We know it  
14          was created in 2013, but the evidence --

15          **THE COURT:** Well, doesn't your complaint indeed  
16          allege that it was sold between 2013 and 2015?

17          **MR. ELKHUNOVICH:** So our only allegations with  
18          respect to sale in 2013 and 2014 --

19          **THE COURT:** Or offered. Offered.

20          **MR. ELKHUNOVICH:** Offered for sale in 2013 and 2014  
21          and sold -- relate to the FinCEN statement of facts and  
22          from -- from those facts that we relied on in the FinCEN  
23          statement of facts, defendants argue that we are alleging that  
24          XRP was offered to the public for sale as a bona fide offer.  
25          That is not the case.

1 In fact, the FinCEN statement, which is Exhibit 1 (sic) to  
2 the opposition -- to -- I'm sorry -- to the defendant's  
3 motion, discusses only three isolated transactions that have  
4 all the indicia of the private offerings. The first --  
5 because they're larger transactions with people who appear to  
6 be sophisticated in cryptocurrency investments.

7 Nothing in the FinCEN -- FinCEN statement says or admits  
8 that in 2013, 2014, or even 2015, there was a bona fide public  
9 offering of XRP. Sure, they sold it. And it may even be true  
10 that members of the public could buy it. But that's not what  
11 a genuine -- which is the word Stolz uses for the -- as what  
12 bona fide means -- that is not a bona fide or genuine offer of  
13 a security -- offering of a security to the public.

14 And -- and then the -- the other issue is, yes, it was all  
15 created at the same time. But my point about escrow is --  
16 goes to the nature of the investment.

17 And let me give you an -- an analogy from sort of a  
18 regular securities as opposed to cryptosecurities.

19 Take this hypothetical. A company has 1 million shares  
20 that -- of stock that the board has authorized. But the  
21 company chooses not to offer that authorized stock to  
22 prospective shareholders, usually referred to as treasury  
23 shares.

24 Then at some point, the company -- at that point, the --  
25 the shares have been created. But it really can't be disputed

1 that there is no genuine public offering or bona fide public  
2 offering.

3 Then the company offers hundred thousand shares to the  
4 public. That's a bona fide offering of those hundred thousand  
5 shares. And -- but then four years later, the company offers  
6 for sale another hundred thousand shares. The second offering  
7 is a separate offering even if the shares are the same. It  
8 doesn't matter when the securities were created. What matters  
9 is when they were offered. And even under the first offered  
10 rule, if the securities are offered in different offerings at  
11 different periods of time, they're different offerings.

12 And the other argument with respect to the cryptographic  
13 escrow is that by changing way they are selling the security,  
14 how much is available for sale at any given time, they changed  
15 the nature of the security in 2017. Whereas before -- again,  
16 analogizing it to the shares, to regular shares, the offering  
17 is we are offering hundred -- there's hundred billion of XRP  
18 available.

19 Here, they created a system by which they have imposed the  
20 limitation upon themselves, the company, of how much XRP they  
21 will sell at any given time. And that was done for a purpose  
22 because there was a concern that by being able to sell  
23 unlimited number -- not unlimited, but a great number of  
24 shares that the company has retained after its creation, they  
25 will be able to crash the market at any given time.

1           So that change changed the nature of the security, and  
2           that happened in 2017.

3           And then, again, going back to the bona fide offer to the  
4           public and the *Stolz* case and its discussion, and counsel  
5           referenced the SEC brief that was submitted in that case, and  
6           it is actually extremely instructive on this point of what it  
7           means for a company to make a bona fide offer to the public  
8           and -- and the reasoning that the *Stolz* court accepted from  
9           the SEC, and -- it's not in the record. It's referenced in  
10          our briefs. But if the court would like, I have copies of  
11          SEC's amicus brief.

12          But on page 13 of that brief, the SEC explained that in  
13          order that an offering be made bona fide to the public so  
14          that -- so as the three-year repose period begins to run, the  
15          offering should be made in a manner that puts the public on  
16          notice that a public offering is occurring and, thus, that the  
17          registration may be required.

18          Under the plain language of the statute, it is not enough  
19          that the security has been offered. The offer must, in  
20          addition, have been bona fide made to the public.

21          The SEC further explained that if an offering is being  
22          conducted as a private offering but in violation of the  
23          registration provisions, the repose period should not start.

24          The SEC went on further and said the explicit reference to  
25          a bona fide offer to the public -- it's in section 13 --

1 indicates that Congress did not intend those who act in a  
2 manner consistent with the private offering to benefit from  
3 the three-year period of repose when so acting. Thus, for  
4 example, an issuer that represents the investors or suggests  
5 through its actions that securities are being sold to only a  
6 small group or to only sophisticated investors should not  
7 benefit from the repose period reserved by Congress to those  
8 who make a bona fide offering to the public.

9 And SEC made this explanation in favor of the first  
10 offered construction by explaining that the bona fide offering  
11 to the public requirement, quote, ameliorates the anomaly and  
12 harshness of the first offered construction by delaying the  
13 start of the three-year period in situations where the public  
14 lacks notice that public -- public offering has commenced.

15 Now the court cannot determine on the pleadings whether a  
16 bona fide offering to the public was made by defendants before  
17 the trigger date of three years, whenever -- whenever that is.  
18 And there is a dispute over which complaint should be used to  
19 measure that. But even putting that aside, there's -- there's  
20 simply no facts in our complaint and no traditionally  
21 noticeable facts and we haven't even heard an argument of when  
22 the first public offering was made.

23 Instead, defendants misconstrue our allegations to say  
24 that from them there is some sort of implication that there  
25 must have been a public offering at some point, the point that

1 they haven't explained when -- when exactly there was a public  
2 offering.

3 These allegations are quoted on page 7 of their opening  
4 brief. But if you look at those allegations in our complaint,  
5 the first is paragraphs -- they reference paragraphs 2 and 4.  
6 But there, the complaint merely alleges that, again, Ripple  
7 just created hundred billion XRP and how much was given to  
8 individual founders and how much was retained by the company.

9 There's nothing there about whether a public offering was  
10 made at that time. It wasn't.

11 In paragraph 5, which is relied on by defendants, the  
12 complaint quotes Ripple's statements from 2014 about its  
13 intention to distribute XRP in certain distribution  
14 strategies.

15 But we do not allege or say that Ripple made a bona fide  
16 public offering at that time. Instead, in those -- in that  
17 paragraph, we refer to Ripple's public distribution efforts in  
18 2017 and 2018, which are indisputably within the repose  
19 period.

20 I already addressed the FinCEN settlement. If you look at  
21 the FinCEN settlement, that is, again -- defendant submitted  
22 as Exhibit A, it does not say that Ripple Labs sold XRP as a  
23 public offering at this time or any time.

24 In fact, if -- if you look at the examples of transactions  
25 that it describes, it talks about minimal sales during a 2013



1 time frame, and those particular sales are things like a  
2 transaction for \$250,000 with an investor in Ripple Labs.  
3 That's not general public.

4 Oh, the point is the FinCEN statement cannot be used to  
5 make a determination on the pleadings when Ripple or even if  
6 Ripple made a bona fide offer to the public.

7 They also rely on the Wiki page from 2014. That's Exhibit  
8 B, but that only says that Ripple sells XRP to fund operations  
9 and promote the network. That's what we allege.

10 That doesn't mean they sold it to the public at that time.  
11 They sold it. But whether or not they sold it to the public  
12 is at a minimum a fact question. To the contrary, our  
13 complaint alleges that it was not until 2017 when sales to the  
14 public really began and when they started signing up exchanges  
15 to distribute this currency.

16 They cite our complaint for an allegation that over a 30  
17 billion XRP were in circulation by mid-2016, but the paragraph  
18 they cite, 26, does not alleged -- allege that there were more  
19 than 30 billion XRP in circulation or that Ripple sold  
20 billions of XRP prior to 2017 as defendants' reply claims.

21 Instead, that paragraph notes that Ripple claimed in June  
22 2015 that it retained 67.51 billion of XRP, more than double  
23 the approximately 32.49 billion XRP held by the others, but  
24 not the public.

25 To the contrary, the same paragraph notes that the XRP

1 held by others significantly overstates independent holdings  
2 of XRP because it's includes the 20 billion provided to  
3 founders and an undisclosed and still unknown to us amount of  
4 XRP used in business development agreements that are still  
5 pending.

6 Defendants take these allegations and read from them that  
7 we have alleged that there were 20, 30 billion of XRP offered  
8 to the public. That's not what the complaint says. So at a  
9 minimum, they're fact questions.

10 Defendants have raised an affirmative defense of statute  
11 of repose and they created a fact question regarding whether a  
12 bona fide public of offering of XRP was made prior to the  
13 three-year trigger date.

14 But that question cannot be resolved on the pleadings, and  
15 nothing in our allegations can be fairly -- can be fairly  
16 categorized as evidence -- indisputable evidence that that has  
17 occurred.

18 **THE COURT:** Okay. All right. Thank you.

19 All right. You get a brief response, and then we're going  
20 to move to the California claims.

21 **MR. MARSHALL:** Your Honor, so a couple of points on  
22 the -- on the requirement that there be a genuine or bona fide  
23 offer to the public.

24 First, we would -- we would rely on the FinCEN settlement.  
25 If the U.S. government has acted on sales to the public, we

1 would -- we would say that those sales are bona fide offers to  
2 the public, if it is enough for the U.S. government --

3 **THE COURT:** Did the settlement say that they have  
4 made the determination that there were sales to the public?

5 **MR. MARSHALL:** They say that there were sales.

6 **THE COURT:** To the public.

7 **MR. MARSHALL:** They say that -- if you read -- if you  
8 read the --

9 **THE COURT:** Where is it?

10 **MR. MARSHALL:** That is Exhibit 1 (sic) to docket  
11 entry -- what is the docket entry of this? Docket entry 70-2.  
12 Or Exhibit A. Sorry.

13 **THE COURT:** Okay.

14 **MR. MARSHALL:** This says at paragraph 23, by on or  
15 about August 4th, 2013, XRP II was engaged in the sale of XRP  
16 currency to third-party entities.

17 Paragraph 26A, it was not until September 26, 2013, that  
18 XRP developed a written AML program. Prior that time XRP had  
19 no written AML program.

20 28A, on September 30th, 2013, XRP II negotiated an  
21 approximately 250,000 transaction by email for the sale of XRP  
22 virtual currency to a third-party individual.

23 **THE COURT:** Okay. But does "third-party individual"  
24 mean public? I mean, counsel's arguing it could have been a  
25 private sale to a third-party entity.

1           **MR. MARSHALL:** Your Honor, I think -- I think that  
2 the -- the --

3                               (Pause in the proceedings.)

4           **MR. MARSHALL:** Oh, okay. So -- yes. So paragraph 25  
5 of the plaintiff's complaint, Your Honor, it says, in May  
6 2015, regulatory authorities in the United States fined Ripple  
7 and XRP II \$750,000 for violating the Bank Secrecy Act by  
8 selling XRP without obtaining the required authorization.

9           As part to the settlement, defendants acknowledge that  
10 they had sold XRP to the general public and agreed a number of  
11 remedial measures, including registration with FinCEN.

12           So in the complaint itself, paragraph 25 alleges sales to  
13 the general public.

14           **THE COURT:** Okay.

15           **MR. MARSHALL:** And then, as you -- as you noted, Your  
16 Honor, the reliance on the fact that XRP was created in 2013  
17 and that XRP is fungible doesn't go to when it was offered.  
18 It goes to that the XRP that is offered today is the same  
19 security that was offered then and that there's no new  
20 security.

21           **THE COURT:** Okay.

22           All right. Let's move to the state claims. And let's  
23 start with -- well, the 25503, the qualified securities  
24 requirement.

25           **MR. MARSHALL:** Yes, Your Honor.

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1           **MR. MARSHALL:** -- while it's possible that there is  
2 an issuer transaction, it's not plausible.

3           And, you know, there's a -- one of the cases that we rely  
4 on for this is pretty -- I think is instructive on the point.  
5 It is the *Westfall* case, Your Honor. And in that case -- let  
6 me just find it.

7           The amount that -- the court followed the exact same  
8 reasoning that -- that we provide here, Your Honor, that the  
9 amount issued and offered by the -- the defendant in  
10 comparison to the amount purchased and the amount in the  
11 market in total is not sufficient to allow a plausible  
12 inference that the defendant was -- that there was an issuer  
13 transaction.

14           **THE COURT:** Okay.

15           **MR. MARSHALL:** We also -- there's -- with regard to  
16 the state law claims, Your Honor, there's no privity alleged  
17 between the -- the -- the plaintiff and the defendants. The  
18 defendant -- or the plaintiffs conflate the requirement of  
19 privity for control person liability with the requirement of  
20 privity between the purchaser and the seller.

21           There certainly are plaintiffs out there that would be  
22 able to meet these (sic) requirement of privity, but the  
23 plaintiff is not one of them, because they did not purchase  
24 directly from Ripple and cannot plausibly allege that they did  
25 purchase directly from Ripple. There's no privity between the

1 two of them.

2 **THE COURT:** Okay. And I mean -- and you know that  
3 they didn't purchase directly from Ripple.

4 **MR. MARSHALL:** They purchased on -- they -- they  
5 purchased on a third-party exchange. And the -- the -- the  
6 third point, Your Honor, is with regard to the claims that  
7 reply upon misrepresentations or alleged misrepresentations,  
8 the complaint does not meet the requirements of 9(b) telling  
9 us the sort of who, what, when, where, why it is false for  
10 each of these allegations.

11 I could -- I could walk through each of them. We did it  
12 in our reply brief, but I believe that the allegations in the  
13 complaint are insufficient to start -- to state a claim based  
14 upon misrepresentation.

15 **THE COURT:** And then --

16 **MR. MARSHALL:** Do you want me to continue with the --

17 **THE COURT:** Yeah, please.

18 **MR. MARSHALL:** So we also believe that *Bowen* --  
19 because plaintiffs here have alleged XRP is a security.

20 **THE COURT:** Well, I'm sorry. They pled fraud and  
21 deceit under the Corporations Code --

22 **MR. MARSHALL:** Yes.

23 **THE COURT:** -- as well as the misrepresentations  
24 under the Corporations Code. And you're applying Rule 9(b) to  
25 both of those.

1           **MR. MARSHALL:** Yes.

2           **THE COURT:** Right?

3           **MR. MARSHALL:** Yes.

4           **THE COURT:** Okay.

5           **MR. MARSHALL:** And, Your Honor, and with regard to  
6 the UCL and FAL claims -- or FLA -- the -- the *Bowen* line --  
7 the *Bowen* line of cases precludes those consumer protection  
8 claims based on securities transactions.

9           **THE COURT:** *Bowen* involved 17200, correct?

10          **MR. MARSHALL:** Yes, Your Honor.

11          **THE COURT:** Is there any case law that explicitly  
12 extends that to the 17500?

13          **MR. MARSHALL:** I believe there is. And I believe we  
14 cited it in our reply brief, Your Honor.

15           Let me find that for you.

16                   (Pause in the proceedings.)

17          **MR. MARSHALL:** Yes. Yes, Your Honor, so as we say in  
18 our reply brief, the *Bowen* rule applies to the FAL and UCLA  
19 (sic) claims. We cite a *Sharp vs. Arena Pharmacy, Inc.*,  
20 Southern District of -- 213 Westlaw 1209 --

21          **THE COURT:** Yeah, is there any circuit authority, is  
22 actually what I meant.

23          **MR. MARSHALL:** There is no circuit authority that we  
24 were able to find, Your Honor.

25          **THE COURT:** Okay.



1 All right.

2 **MR. MARSHALL:** And also, Your Honor, we believe that  
3 there's a safe harbor for legislative prescribed conduct under  
4 the FAL and UCL claims, that if you find that the statute of  
5 repose applies and bars the federal claims, plaintiff should  
6 not be able to plead around that by using the consumer  
7 protection statutes in California.

8 **THE COURT:** Okay. All right. Thank you.

9 All right. You agree, though, that even if the statute of  
10 repose applies to the federal securities claims, they wouldn't  
11 apply to the state securities claims but the -- but your safe  
12 harbor argument only goes to the consumer claims, correct?

13 **MR. MARSHALL:** Correct.

14 **THE COURT:** But the state claims would go forward.

15 **MR. MARSHALL:** The -- they would not be barred by the  
16 federal repose.

17 **THE COURT:** Right.

18 Okay. And they would otherwise go forward unless the  
19 court found independent bases for dismissing them.

20 **MR. MARSHALL:** Yes, we believe they would be  
21 dismissed on other grounds, like the privity --

22 **THE COURT:** Right.

23 **MR. MARSHALL:** -- or lack of an issuer transaction.

24 **THE COURT:** Right.

25 All right. Response.

1                   **MR. ELKHUNOVICH:** Great. That was a lot.

2                   Let me address the initial distribution purchase from  
3 defendants' passing of title issues, which are all  
4 interrelated and basically go into injecting flawed  
5 probability analysis into the legal plausibility analysis.

6                   Simply, the math doesn't add up. Defendants use their own  
7 report, which we did in our complaint, but I don't believe  
8 that entitles them to a presumption that all the facts in that  
9 report are true and inferences to be drawn in their favor.

10                  But in any event, they take a report that talks about the  
11 volume of sales of XRP by defendants in comparison to the  
12 overall volume of transactions of XRP, whatever that means.  
13 Those are not necessarily the -- that those transactions are  
14 not necessarily sales.

15                  But in any event, even taking their facts as they state  
16 them, they claim that there's 1 in 10,000 chance that any  
17 given XRP purchased during that quarter, the same quarter when  
18 the plaintiff bought the XRP, comes from them as opposed to  
19 somebody else.

20                  Well, first of all, how do we extrapolate the average of  
21 what happened during any particular quarter to what happened  
22 on specific days when the plaintiff made his purchases.

23                  It is certainly possible at a minimum that those sales  
24 over the first quarter of XRP by Ripple are not equally  
25 distributed among days in that quarter.

1 But furthermore, plaintiff bought hundred and twenty-eight  
2 thousand nine hundred and seventy-eight XRP, so even if there  
3 is 1 in 10,000 chance that any one of those came from XRP --  
4 came from Ripple -- I'm sorry -- or XRP II, is really the  
5 entity -- if he bought 128,000 of them, there's near certainty  
6 from probability standpoint that at least one of them came  
7 from the defendants.

8 And the point here, it's a fact question. They don't know  
9 for sure. We don't know for sure. And I don't believe they  
10 even have that information of whether the XRP that we bought  
11 came from them. So, instead, they rely on this immunity by  
12 selling on exchange argument.

13 But just because I buy my groceries at a farmer's market  
14 on Sunday doesn't mean that I'm not buying them from a  
15 particular vendor. The fact that we -- that the plaintiff  
16 bought XRP on the exchange does not mean that he bought it  
17 from the exchange. Exchange is not a seller. Exchange  
18 facilitates the transactions between the sellers and the  
19 buyers.

20 And so he bought it from somebody. And we allege that  
21 somebody is one of the defendants, XRP II. And it can't be  
22 determined on the pleadings. And it can't be determined  
23 through this probabilistic analysis because even if you were  
24 to accept it, that means there is almost hundred percent  
25 chance that at least some portion of the XRP that our

1 plaintiff bought comes from XRP -- XRP II.

2 Counsel didn't address the solicitation prong of the  
3 statutory seller element. That issue is briefed. There's  
4 certainly allegations in this complaint that defendants  
5 solicited purchases of XRP.

6 Paragraph 44 talks about the entire section on Ripple's  
7 website telling people how to do it. Tweets such as "forget  
8 about coin. We are all in on XRP." Paragraph 48. The C.E.O.  
9 telling the public, "I remain very, very, very long XRP."  
10 There is an expression in the industry H-O-D-L -- instead of  
11 "hold," it's H-O-D-L -- "I'm on the H-O-D-L side."

12 California's security -- securities laws claims, again,  
13 counsel didn't address the in-state transaction requirement.  
14 But all the defendants are residents and have a primary place  
15 of business in California. Their activities all emanate from  
16 California. I think this argument really kind of collapses  
17 with whether or not plaintiff bought XRP from the defendants.  
18 If he did, he bought it from California defendants.

19 We alleged negligent misrepresentation claims under 25401.  
20 Rule 9(b) indisputably does not apply there. With respect to  
21 rule 9(b), our briefing -- I believe it's on page 19 through  
22 20 of our opposition -- catalogs all the various  
23 misrepresentations that we allege were made with  
24 particularity.

25 **THE COURT:** Did you cite authority for the

1 proposition that Rule 9(b) doesn't apply to misrepresentations  
2 under the Corporation Code?

3 **MR. ELKHUNOVICH:** Negligent misrepresentation.

4 **THE COURT:** You've only asserted negligent  
5 misrepresentation?

6 **MR. ELKHUNOVICH:** No, we asserted both, Your Honor.  
7 We asserted both intentional and --

8 **THE COURT:** Doesn't 9(b) apply to the intentional  
9 misrepresentations?

10 **MR. ELKHUNOVICH:** Yes, Your Honor.

11 Now, UCL, again, the issues have been briefed. But just  
12 very briefly, defendants' argument is basically that UCL claim  
13 should be dismissed because it is based on a sale of  
14 securities claim.

15 And counsel admitted that for purposes of this motion, but  
16 only for purposes of this motion, they're not arguing that XRP  
17 is a security -- is not a security.

18 But believe that if this case proceeds, that will be one  
19 of the key issues -- one of the key factual issues that will  
20 be hotly disputed. And assume the court were to find that XRP  
21 is not a security, well, certainly at that point, those UCL  
22 claims and the false advertising claims are alive and are not  
23 preempted by any securities law.

24 And lastly, if I may, I just want to make one point  
25 regarding the federal claims and the statute of repose.

1 Counsel cited paragraph 25 of the complaint. And two things  
2 there.

3 One, I must admit that the summary of FinCEN's findings in  
4 the statement of facts, as we pleaded them, is not hundred  
5 percent accurate. We did say in paragraph 25 that defendants  
6 acknowledge that they had sold XRP to the general public.

7 By that, we were referring to the three transactions  
8 discussed in the settlement. To the extent more can be  
9 implied from that, the -- the settlement, which we went  
10 over -- which the court went over with counsel simply does not  
11 support that, but --

12 **THE COURT:** So you're suggesting that I not rely upon  
13 what you've pled because it's inaccurate and, instead, rely  
14 upon the actual statement -- settlement statement.

15 **MR. ELKHUNOVICH:** Well, but -- I'm clarifying the  
16 pleading.

17 **THE COURT:** I mean, given how careful obviously  
18 you're being about the use of "to the public," I mean, that's  
19 the sense essence of your argument, why did you include that  
20 in your complaint?

21 **MR. ELKHUNOVICH:** Well, because we were describing  
22 the admissions of the sales to the public.

23 And that was the second part of -- of the argument. The  
24 SEC -- as the SEC amicus brief makes clear, an offering to the  
25 public is not enough. It has to be the type of bona fide

1 public offering that would put the public on notice. Let me  
2 just find the exact language from --

3 (Pause in the proceedings.)

4 **MR. ELKHUNOVICH:** In cases where an offering -- and  
5 I'm quoting from the SEC amicus brief. "In cases where an  
6 offering is made to the public but is conducted in a manner  
7 that appears consistent with the private offering, the public  
8 receives no notice that the offering may require  
9 registration."

10 And that is exactly the point here. We were not alleging  
11 in -- in that language in paragraph 25 there was a bona fide  
12 public offering. We allege that XRP -- I'm sorry -- the  
13 defendants offered to sell XRP to --

14 **THE COURT:** The public.

15 **MR. ELKHUNOVICH:** -- certain members of the public.

16 **THE COURT:** You don't say that. You said "general  
17 public."

18 **MR. ELKHUNOVICH:** In that respect --

19 **THE COURT:** Not "certain members."

20 **MR. ELKHUNOVICH:** In that respect, that's a mistake.

21 **THE COURT:** Okay.

22 **MR. ELKHUNOVICH:** And, again, paragraph 25 is a  
23 summary of the FinCEN settlement. I don't think that we (sic)  
24 would be a fair summary of the FinCEN statement that there was  
25 an admission by defendants there that there was sale to the

1 general public in the sense of a public offering.

2 There were sales to the -- members of the general public  
3 that are described in the FinCEN --

4 **THE COURT:** You don't make that distinction in your  
5 complaint.

6 **MR. ELKHUNOVICH:** We did not. No, Your Honor.

7 **THE COURT:** All right.

8 All right. We need to wrap it up. I have an afternoon  
9 calendar.

10 **MR. MARSHALL:** Sure.

11 Your Honor, just two -- two points. In addition to the  
12 admission in paragraph 25, the heading in 4A, XRP's  
13 generous --

14 **THE COURT:** Wait. Wait. Still in the complaint?

15 **MR. MARSHALL:** In the complaint.

16 XRP's genesis and public offerings, so it is referencing  
17 "public offerings" multiple times in the complaint.

18 **THE COURT:** I'm sorry. Where -- where are you  
19 reading that?

20 **MR. MARSHALL:** It is page 7, right under "Substantive  
21 Allegations."

22 **THE COURT:** Oh. I see that.

23 **MR. MARSHALL:** Subheading A.

24 **THE COURT:** Right. Right.

25 **MR. MARSHALL:** So just very quickly, Your Honor,



1 one -- one quick point on the plaintiff's argument regarding  
2 the probability analysis, the .01 percent factored in that  
3 there were hundred thousand shares. It wasn't based on the  
4 sale of one share, so that is the probability that any one of  
5 those 100,000 shares was from XRP.

6 And then I just wanted to point the court to a case we  
7 cited in our opening brief that was not responded to in -- in  
8 plaintiff's papers, which is the *Welgus vs. TriNet*, 2000 --  
9 2017 Westlaw 6466264, and that was affirmed by the Ninth  
10 Circuit in 765 Fd.S 239.

11 The court rejected the plaintiff's argument that it was  
12 undeniable that the defendant was the seller based on the sale  
13 of 2.25 million shares in an IPO out of 15 million and that  
14 all 13.8 million shares in the secondary offering, because the  
15 allegations do not constitute facts that the plaintiff  
16 purchased his shares directly from the defendant as opposed to  
17 another seller or intermediary.

18 We think that that analysis is directly on point here and  
19 should be instructive on this point.

20 **THE COURT:** Okay.

21 All right. To -- to conclude, though, with regard to the  
22 essence of plaintiff's counsel's opening argument on the  
23 public offering, are you taking the position that these few  
24 instances in the complaint in which the word "public" is  
25 inserted in the language are enough for the court to make

1 that? Or do you --

2 Tell me why you disagree with plaintiff's counsel's  
3 characterization of these as factual disputes not ripe for a  
4 consideration on a 12(b) motion.

5 **MR. MARSHALL:** Well, two -- two things Your Honor.  
6 One I think that Ninth Circuit law is clear that it is the  
7 plaintiff's burden to show that repose does not apply in its  
8 pleadings.

9 They have -- I believe they have shown that it does apply  
10 in their pleadings, but they certainly haven't met that  
11 burden.

12 Secondly, Your Honor, they have to be held to the  
13 allegations in their complaint. They have to be held to the  
14 allegations that there were public sales. They have to be  
15 held to the allegation that there was 30 billion in  
16 circulation by 2015.

17 All of those facts alleged, they can't walk away from.  
18 And all of those facts meet the *Stolz* requirement of a genuine  
19 offer to the public.

20 **THE COURT:** And do you think that a dismissal on  
21 statute of repose grounds is one that should be entered with  
22 prejudice?

23 **MR. MARSHALL:** I believe it should be entered with  
24 prejudice, Your Honor.

25 **THE COURT:** Why?

1           **MR. MARSHALL:** Because the allegations in the  
2 complaint themselves support -- they can't -- I don't believe  
3 they could amend around the fact that the purchase date, when  
4 it was first offered -- all -- all of those things are things  
5 that are -- can't be alleged differently within the confines  
6 of requirements of how you have to plead a complaint.

7           They -- they have given us sort of all of the allegations  
8 necessary for application of the statute of repose. And I  
9 think that they -- that can't be amended around. I think that  
10 there are certain of their claims, the -- the 9(b) claims or  
11 the claims that are -- we think are subjected to 9(b), I think  
12 those could be amended possibly.

13           I think that -- although they have not pled in the  
14 alternative, I think the UCL claims, the consumer protection  
15 claims, possibly could be repled. It would be a very  
16 different complaint without sort of the reliance on the  
17 security aspects. But I believe those might be able to be  
18 repled.

19           But this plaintiff, I don't believe, can replead around  
20 the statute of repose.

21           **THE COURT:** Hmm.

22           Okay. Did you want to respond to that?

23           **MR. ELKHUNOVICH:** Can I address that just briefly?

24           Your Honor if the court were to find a repose issue in the  
25 complaint it should allow us an opportunity to amend, and

1 here's why.

2 Even since the briefing of this motion and since the  
3 complaint was filed, we have since discovered new facts that  
4 would support a -- our contention that up to certain period of  
5 time, the offerings that -- that defendants made of XRP are  
6 more like private offerings and not like public offerings.

7 For example, Ripple's CTO David Schwartz recently stated  
8 that Ripple, quote, started selling XRP only after there was a  
9 market price and for negligible amounts compared to other  
10 funding.

11 And like he said, now it's all significantly more.

12 Ripple made a submission that we found to the Conference  
13 of Bank Supervisors in 2014 stating that it, quote, holds a  
14 substantial amount of XRP which it sells from time to time to  
15 financial institutions and entities seeking to be  
16 market-makers.

17 Ripple relied on this argument to -- relied on these  
18 statements to argue that consumer protection rules should not  
19 be rigidly applied to them.

20 So there are facts that we have discovered since filing  
21 the complaint and since the briefing on this motion that would  
22 further support our contention that there was no bona fide  
23 public offering until much later, closer to 2017, rather than  
24 2013, '14, or '15, as defendant contends.

25 **THE COURT:** Hmm.

1           **MR. ELKHUNOVICH:** And just last question, if Your  
2 Honor would like a copy of the amicus brief by the SEC in the  
3 *Stolz* case.

4           **THE COURT:** No. No.

5           **MR. ELKHUNOVICH:** Okay.

6           **THE COURT:** All right. Matter stands submitted.

7 Thank you.

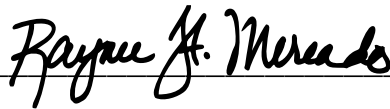
8           **MR. ELKHUNOVICH:** Thank you.

9           (Proceedings were concluded at 12:12 P.M.)

10                               --o0o--

11  
12  
13                               **CERTIFICATE OF REPORTER**

14  
15           I certify that the foregoing is a correct transcript  
16 from the record of proceedings in the above-entitled matter.  
17 I further certify that I am neither counsel for, related to,  
18 nor employed by any of the parties to the action in which this  
19 hearing was taken, and further that I am not financially nor  
20 otherwise interested in the outcome of the action.

21  
22                               

23           Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

24                               Tuesday, February 11, 2020